

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DAMIAN D. SMITH,

Plaintiff,

v.

CAROLYN COLVIN, Acting  
Commissioner of Social Security,

Defendant.

CASE NO. 3:14-CV-05581 RBL-DWC

REPORT AND RECOMMENDATION  
ON PLAINTIFF'S COMPLAINT

Noting Date: May 15, 2015

The District Court has referred this action, filed pursuant to 42 U.S.C. § 405(g), to United States Magistrate Judge David W. Christel. Plaintiff filed this matter seeking judicial review of Defendant's denial of Plaintiff's application for supplemental security income ("SSI") benefits.

After considering and reviewing the record, the Court concludes the ALJ incorrectly determined the opinion of examining psychiatrist Dr. Jennifer Irwin, M.D. was based solely on Plaintiff's self-reports. In addition to Plaintiff's self-reports, Dr. Irwin's opinion was based on objective medical evidence, Plaintiff's diagnosed impairments, Dr. Irwin's personal observations, and a portion of the record. Further, the ALJ provided only a conclusory statement

1 to support finding Dr. Irwin's opinion is not supported by the medical record. The Court also  
2 concludes the ALJ's reasons for giving "no weight" to the opinion of treating physician Dr.  
3 Vincent Phillips, M.D. are not specific and legitimate and supported by substantial evidence.

4 Had the ALJ fully credited the opinions of Drs. Irwin and Phillips, the residual functional  
5 capacity may have included additional limitations. The ALJ's error is therefore not harmless, and  
6 this matter should be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to  
7 the Acting Commissioner for further proceedings consistent with this Report and  
8 Recommendation.

#### 9 FACTUAL AND PROCEDURAL HISTORY

10 On March 18, 2011, Plaintiff filed an application for SSI benefits, alleging disability as of  
11 August 21, 2006. *See* Dkt. 13, Administrative Record ("AR") 33. The application was denied  
12 upon initial administrative review and on reconsideration. *See id.* A hearing was held before  
13 Administrative Law Judge Mattie Harvin-Woode ("ALJ") on November 13, 2012. *See* AR 61-  
14 119. In a decision dated January 30, 2013, the ALJ determined Plaintiff to be not disabled. *See*  
15 AR 33-47. Plaintiff's request for review of the ALJ's decision was denied by the Appeals  
16 Council, making the ALJ's decision the final decision of the Commissioner of Social Security  
17 ("Commissioner"). *See* AR 1-6; 20 C.F.R. § 404.981, § 416.1481.

18 In Plaintiff's Opening Brief, Plaintiff maintains the ALJ erred by: (1) providing legally  
19 insufficient reasons for discrediting medical opinion evidence; (2) providing legally insufficient  
20 reasons for discrediting Plaintiff's subjective complaints; and (3) relying on improper evidence at  
21 Step Five of the sequential evaluation process. Dkt. 20.

## STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

## DISCUSSION

### **(1) Whether the ALJ provided legally sufficient reasons for discrediting medical opinion evidence.**

#### **a. Dr. Jennifer Irwin, M.D.**

Plaintiff contends the ALJ erred in her assessment of the medical opinion evidence of examining psychiatrist Dr. Jennifer Irwin, M.D. *See* Dkt. 20, pp. 9-11. Specifically, Plaintiff maintains Dr. Irwin's findings were based on more than Plaintiff's self-reported symptoms, and therefore the ALJ erred when she gave no weight to Dr. Irwin's opinion for this reason. *Id.*

The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). When a treating or examining physician's opinion is contradicted, the opinion can be rejected "for specific and legitimate reasons that are supported by substantial evidence in the record." *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by "setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

1 Dr. Irwin submitted a report on June 22, 2011. AR 507-11. The report was based on  
2 information obtained from a clinical interview with a mental status examination (“MSE”) of  
3 Plaintiff and Dr. Irwin’s review of a portion of the record. *See* AR 507. Dr. Irwin diagnosed  
4 Plaintiff with major depressive disorder, chronic, recurrent; pain disorder; anxiety disorder, not  
5 otherwise specified; and alcohol abuse. AR 510.

6 Dr. Irwin opined Plaintiff is able to perform simple and repetitive tasks, perform detailed  
7 and complex tasks, and accept instructions from supervisors. AR 511. Further, Plaintiff is  
8 markedly impaired in his ability to interact with coworkers and the public and maintain regular  
9 attendance in the workplace. *Id.* Dr. Irwin also found Plaintiff has a severely limited ability to  
10 deal with the usual stress encountered in the workplace and complete a normal  
11 workday/workweek without interruptions from a psychiatric condition. *Id.* Based on the MSE,  
12 Plaintiff’s ability to perform work activities on a consistent basis without special or additional  
13 instruction is minimally impaired; however, Dr. Irwin opined Plaintiff is markedly impaired in  
14 this area according to history. *Id.*

15 The ALJ gave no weight to Dr. Irwin’s opinion because the “opinion is based solely on  
16 the claimant’s subjective statements and, as discussed above, the claimant is not credible.” AR  
17 43. According to the Ninth Circuit, “[an] ALJ may reject a [ ] physician’s opinion if it is based  
18 ‘to a large extent’ on a claimant’s self-reports that have been properly discounted as incredible.”  
19 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (*quoting Morgan v. Comm’r. Soc.*  
20 *Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (*citing Fair v. Bowen*, 885 F.2d 597, 605 (9th  
21 Cir. 1989)). This situation is distinguishable from one in which the doctor provides her own  
22 observations in support of her assessments and opinions. *See Ryan v. Comm’r of Soc. Sec.*  
23 *Admin.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008) (“an ALJ does not provide clear and  
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1 convincing reasons for rejecting an examining physician’s opinion by questioning the credibility  
2 of the patient’s complaints where the doctor does not discredit those complaints and supports his  
3 ultimate opinion with his own observations”); *see also Edlund v. Massanari*, 253 F.3d 1152,  
4 1159 (9th Cir. 2001). According to the Ninth Circuit, “when an opinion is not more heavily  
5 based on a patient’s self-reports than on clinical observations, there is no evidentiary basis for  
6 rejecting the opinion.” *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) (*citing Ryan*, 528  
7 F.3d at 1199-1200).

8         The Court notes “experienced clinicians attend to detail and subtlety in behavior, such as  
9 the affect accompanying thought or ideas, the significance of gesture or mannerism, and the  
10 unspoken message of conversation. The [MSE] allows the organization, completion and  
11 communication of these observations.” Paula T. Trzepacz and Robert W. Baker, *The Psychiatric*  
12 *Mental Status Examination 3* (Oxford University Press 1993). “Like the physical examination,  
13 the [MSE] is termed the *objective* portion of the patient evaluation.” *Id.* at 4 (emphasis in  
14 original).

15         In forming her opinion, Dr. Irwin performed an extensive and thorough MSE, listing a  
16 number of results. AR 509-10. Dr. Irwin also reported many of her own observations. *See* AR  
17 509. For example, Dr. Irwin observed Plaintiff held his head at an angle and hugged himself  
18 throughout the evaluation. *Id.* Plaintiff was polite and cooperative, but had decreased eye  
19 contact. *Id.* Dr. Irwin also noted Plaintiff had logical and goal-oriented thought processes, but  
20 had excessive storytelling and halting speech. *Id.* Dr. Irwin could not tell if the halting speech  
21 was due to psychomotor slowing or if it was secondary to pain. *Id.* Plaintiff also had suicidal  
22 ideations. *Id.* Dr. Irwin found Plaintiff’s mood to be guarded and his affect restricted. AR 510.

1 Dr. Irwin also based her opinion on her assessment of Plaintiff's diagnosed mental impairments  
2 and a review of Plaintiff's adult function report and a psychiatric evaluation.

3 Based on a review of the relevant record, the undersigned concludes Dr. Irwin's opinion  
4 of Plaintiff's limitations was based on more than Plaintiff's self-reported symptoms. Rather, Dr.  
5 Irwin provided a medical source statement based on a portion of the record, Dr. Irwin's  
6 observations, the objective results of the MSE, Plaintiff's diagnosed impairments, and Plaintiff's  
7 self-reported symptoms. Accordingly, the ALJ's finding is not supported by substantial evidence.

8 The ALJ also gave no weight to Dr. Irwin's opinion because "[t]he longitudinal medical  
9 evidence indicates that the claimant is not so severely limited." AR 43. The ALJ, however, has  
10 failed to specify anything from the "longitudinal medical evidence" that conflicts with Dr.  
11 Irwin's findings regarding Plaintiff's functional limitations. The ALJ provided only a conclusory  
12 statement finding the record does not support Dr. Irwin's opinion, which is insufficient to reject  
13 the opinion. *See Embrey*, 849 F.2d at 421-22 (conclusory reasons do "not achieve the level of  
14 specificity" required to justify an ALJ's rejection of an opinion); *McAllister v. Sullivan*, 888 F.2d  
15 599, 602 (9th Cir. 1989) (an ALJ's rejection of a physician's opinion on the ground that it was  
16 contrary to clinical findings in the record was "broad and vague, failing to specify why the ALJ  
17 felt the treating physician's opinion was flawed").

18 The ALJ incorrectly determined Dr. Irwin's report was based solely on Plaintiff's self-  
19 reported symptoms and failed to provide more than a conclusory statement when finding Dr.  
20 Irwin's opinion was not supported by the medical evidence. Accordingly, the ALJ erred in her  
21 assessment of Dr. Irwin's opinion.

22 The Ninth Circuit has "recognized that harmless error principles apply in the Social  
23 Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (citing *Stout v.*

1 *Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th Cir. 2006) (collecting  
 2 cases)). The Ninth Circuit noted “in each case we look at the record as a whole to determine [if]  
 3 the error alters the outcome of the case.” *Id.* The court also noted the Ninth Circuit has “adhered  
 4 to the general principle that an ALJ’s error is harmless where it is ‘inconsequential to the  
 5 ultimate nondisability determination.’” *Id.* (quoting *Carmickle v. Comm’r Soc. Sec. Admin.*, 533  
 6 F.3d 1155, 1162 (9th Cir. 2008)) (other citations omitted). The court noted the necessity to  
 7 follow the rule that courts must review cases “‘without regard to errors’ that do not affect the  
 8 parties’ ‘substantial rights.’” *Id.* at 1118 (quoting *Shinsheki v. Sanders*, 556 U.S. 396, 407 (2009)  
 9 (quoting 28 U.S.C. § 2111) (codification of the harmless error rule)).

10 Had the ALJ properly considered Dr. Irwin’s opinion, she may have included additional  
 11 limitations in the residual functional capacity (“RFC”) and in the hypothetical questions posed to  
 12 the vocational expert, Marilyn Thomas. The ALJ’s ultimate determination regarding disability  
 13 was based on an incorrectly assessed RFC and the testimony from the vocational expert that was  
 14 based on the incorrect RFC, and therefore the ALJ’s error is not harmless.

15 b. Dr. Vincent Phillips, M.D.

16 Plaintiff asserts the ALJ also erred by providing legally insufficient reasons for rejecting  
 17 the opinion of treating physician Dr. Vincent Phillips, M.D. Dkt. 20, pp. 4-9. Dr. Phillips opined  
 18 Plaintiff was totally disabled and unable to sustain full time work. AR 661. The opinion was  
 19 based on Plaintiff’s chronic back pain and depression. *Id.* Dr. Phillips noted Plaintiff’s  
 20 documented “extensive c-spine disease” is consistent with Plaintiff’s pain and neck stiffness. *Id.*

21 The ALJ gave no weight to the opinion of Dr. Phillips because the issue of Plaintiff’s  
 22 ability to sustain employment is reserved to the Commissioner and the opinion is inconsistent  
 23 with the objective medical evidence. AR 45. The ALJ failed to identify anything from the  
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1 objective medical evidence in conflict with Dr. Phillips's findings. The ALJ provided only a  
 2 conclusory statement finding the record does not support Dr. Phillips's opinion, which is  
 3 insufficient to reject the opinion. *See Embrey*, 849 F.2d at 421-22.

4 Further, it is not clear Dr. Phillips's opinion regarding Plaintiff's ability to work is  
 5 reserved to the Commissioner. A doctor's opinion stating it is unlikely a claimant could sustain  
 6 full-time competitive employment may not be a conclusion reserved to the Commissioner;  
 7 rather, it may be "an assessment based on objective medical evidence of [the claimant's]  
 8 likelihood of being able to sustain full-time employment given the many medical and mental  
 9 impairments [the claimant] faces[.]" *Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012) (*citing*  
 10 20 C.F.R. § 404.1527(d)(1)). In this case, Dr. Phillips's opinion appears to be an assessment of  
 11 Plaintiff's likelihood of being able to sustain full-time employment, and therefore the ALJ's  
 12 reason for rejecting Dr. Phillips's opinion is not legitimate.

13 As the ALJ failed to provide specific and legitimate reasons supported by substantial  
 14 evidence to discredit the opinion of Dr. Phillips, the ALJ erred in her assessment of Dr. Phillips's  
 15 opinion. This error affects the RFC assessment and the vocational expert's testimony, and  
 16 therefore the ultimate determination regarding disability. Accordingly, the error is not harmless.

17 **(2) Whether the ALJ provided legally insufficient reasons for discrediting Plaintiff's**  
 18 **subjective complaints.**

19 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to  
 20 reject a claimant's testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)  
 21 (*quoting Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). "General findings are  
 22 insufficient; rather, the ALJ must identify what testimony is not credible and what evidence  
 23 undermines the claimant's complaints." *Lester*, 81 F.3d at 834. "In weighing a claimant's  
 24 credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his



1 testimony or between his testimony and his conduct, his daily activities, his work record, and  
 2 testimony from physicians and third parties concerning the nature, severity, and effect of the  
 3 symptoms of which he complains.” *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir.  
 4 1997).

5 In this case, the ALJ found Plaintiff’s testimony concerning the intensity, persistence, and  
 6 limiting effects of his symptoms not fully credible, and provided a number of clear and  
 7 convincing reasons in support. *See* AR 38-43. The ALJ reasonably considered: (1) medical  
 8 evidence contradicting and/or failing to support the degree of limitation, *Carmickle*, 533 F.3d at  
 9 1161 (“Contradiction with the medical record is a sufficient basis for rejecting the claimant’s  
 10 subjective testimony.”) (*citing Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995)); (2)  
 11 Plaintiff’s inconsistent statements, including inconsistent statements regarding marijuana use; (3)  
 12 Plaintiff’s activities of daily living, including riding a bike, washing windows and cleaning out  
 13 the garage, indicated a greater level of physical capacity than alleged, *Molina*, 674 F.3d at 1112-  
 14 13; (4) Plaintiff’s drug seeking behavior; and (5) Plaintiff’s apparent exaggerated demeanor at  
 15 the ALJ hearing. AR 42-43.

16 Plaintiff challenges some of the ALJ findings, but fails to demonstrate the ALJ’s  
 17 interpretation of the evidence was not rational or otherwise show the ALJ erred. *See* Dkt. 20, pp.  
 18 11-13. Accordingly, the ALJ need only reconsider Plaintiff’s credibility as necessitated by  
 19 further consideration of the medical opinion evidence from Drs. Irwin and Phillips.

20 **(3) Whether the ALJ improperly assessed Plaintiff’s residual functional capacity**  
 21 **and erred by basing his step five findings on the improper residual functional**  
 22 **capacity.**

23 Plaintiff also argues the ALJ erred in her determination of Plaintiff’s RFC and in relying  
 24 on the improper RFC to find Plaintiff was able to perform other jobs found in the national

1 economy at Step Five. Dkt. 20, p. 13. As the ALJ improperly assessed the opinions of Drs. Irwin  
2 and Phillips, the Court concluded the ALJ erred in the RFC assessment and therefore in relying  
3 on improper testimony to find Plaintiff not disabled at Step Five. *See* Section 1.a. Accordingly,  
4 on remand the ALJ must assess Plaintiff's RFC anew and must reassess her Step Five finding  
5 based on the new RFC determination.

6 Although Plaintiff argues in a conclusory manner this matter should be remanded with a  
7 direction to award benefits, *see* Dkt. 20, p. 11, the Court concludes it would be inappropriate to  
8 do so because it is unclear if the ALJ would be required to find Plaintiff disabled if the  
9 improperly discredited evidence was credited as true. *See Garrison v. Colvin*, 759 F.3d 995,  
10 1020 (9th Cir. 2014) (*citing Ryan*, 528 F.3d at 1202).

#### 11 CONCLUSION

12 Based on the above stated reasons and the relevant record, the undersigned recommends  
13 that this matter be REVERSED and REMANDED pursuant to sentence four of 42 U.S.C. §  
14 405(g) to the Acting Commissioner for further proceedings consistent with this Report and  
15 Recommendation. JUDGMENT should be for plaintiff and the case should be closed.

16 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
17 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.  
18 6. Failure to file objections will result in a waiver of those objections for purposes of de novo  
19 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit  
20 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on May 15, 2015,  
21 as noted in the caption.

1 Dated this 24<sup>th</sup> day of April, 2015.

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4 David W. Christel  
5 United States Magistrate Judge  
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